No. 87-2098

In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES H. BURNLEY, IV, SECRETARY OF TRANSPORTATION,
Appellant,
v.
MID-AMERICA PIPELINE COMPANY,
Appellee.

On Appeal from the United States District Court for the Northern District of Oklahoma

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, *ET AL.* AS AMICI CURIAE IN SUPPORT OF APPELLEE

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, *ET AL.* AS AMICI CURIAE IN SUPPORT OF APPELLEE

INTEREST OF AMICI CURIAE

The parties set out below file this brief as *amici curiae* in support of the Motion of Mid-America Pipeline Company to Affirm the judgment of the District Court.[1]

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[1] This brief is filed with consent of all parties. Pursuant to Rule 36, letters of consent from the parties have been filed with the Clerk.

Chamber of Commerce of the United States [2]
Interstate Natural Gas Association of America [3]
Central Illinois Public Service Company
Southern Company Services, Inc.
Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Savannah Electric and Power Company
Southern Electric Generating Company

Amici are, or represent, entities that are required to pay "annual charges" or "fees" to administrative agencies of the executive branch for the general fiscal support of these agencies. *Amici* are concerned about the emerging trend on the part of Congress to authorize agencies to assess charges to pay for general agency operations, which charges have no relationship to costs incurred with respect to or benefits conferred upon specific parties required to pay the charges.[4] Because they conduct busi-

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[2] The Chamber of Commerce is the largest federation of business and professional organizations in the United States. Its membership encompasses over 180,000 companies, partnerships and proprietorships, as well as several thousand trade and professional associations, and state and local chambers of commerce. The Chamber of Commerce regularly advocates its member-employers' views in court on issues of national concern to the business community.

[3] INGAA is a nonprofit national association whose members include virtually all of the major interstate natural gas transmission companies operating in the United States and three Canadian interprovincial pipelines which are categorized as Group I pipelines by the National Energy Board of Canada. Its U.S. members account for over 90% of all natural gas transported and sold for resale in interstate commerce and are subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*; the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 *et seq.*; and the Department of Energy Organization Act, 42 U.S.C. §§ 7101, *et seq.*

[4] Certain of the *amici* are petitioners in *Interstate Natural Gas Association, et al. v. Federal Energy Regulatory Comm'n*, Nos. 87-

ness subject to the jurisdiction of many federal agencies, *amici* are, or easily could become, subject to more of these executive branch agency taxes if Congress continues to shift responsibility for making tax decisions to the politically insulated offices of "self-financing" administrative agencies.

Amici support the judgment of the District Court striking down Section 7005 [5] in this case and wish to contribute to the resolution of the constitutional issues raised by this case.

STATEMENT OF THE CASE

Amici adopt Appellee's Statement of the Case, which fairly sets forth the facts and the relevant statutory background.

SUMMARY OF ARGUMENT

This case presents the question whether Congress may cede to an agency the fundamental decisions necessary to the exercise of the taxing power when Article I of the Constitution grants to Congress "the Power To lay and collect Taxes," (Art. I, § 8, Cl. 1), and requires that "Bills for raising Revenue . . . originate in the House of Representatives", (Art. I, § 7, Cl. 1). *Amici* maintain that the commitment of the taxing power to the legislative branch in Article I, Sections 7 and 8, reflects a conscious and fundamental allocation of responsibility by the

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1570 *et al.* (D.C. Cir., filed October 9, 1987), and the Chamber of Commerce is participating as an *amicus curiae* in *Mid-America Pipeline Co. v. Federal Energy Regulatory Commission*, No. 87-C-571E (N.D. Okla., filed July 20, 1987), challenging the constitutionality of Section 3401 of the Omnibus Budget Reconciliation Act of 1986 (discussed *infra* pp. 18-22) which authorizes the Federal Energy Regulatory Commission to impose "annual charges" sufficient to cover its entire budget. Proceedings in those cases have been held in abeyance pending the outcome of this case.

[5] Consolidated Omnibus Budget Reconciliation Act of 1985, § 7005, P.L. 99-272, 100 Stat. 82.

Framers based on their belief that the taxing power could only be constrained effectively by assigning it to the portion of the Federal Government—the House of Representatives—that was most immediately answerable to the electorate. Where the text of the Constitution itself commits a power to the legislative branch, and further describes, with specificity, the mechanics of its proper exercise, the legislature's departure from the constitutional plan must be corrected by this Court.

Congress' attempt to insulate itself from political accountability for taxing decisions and agency actions—through Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) and similar enactments discussed below—distorts the constitutional plan in three important ways.

First, under the Origination Clause, it is the members of the House of Representatives, in the first instance, and then the Senate to whom concerned citizens and organizations look to establish tax policy, particularly the basic distributive formulae that determines who should pay how much. Under Section 7005, however, the House and the Senate no longer participate in these basic distributive decisions. The legislative process that the Framers intended would discipline taxing decisions is replaced by an administrative process conducted by agency officials. Indeed, the only similarity between the two processes is that because decisions involving taxation are inherently so discretionary, the particular taxing decisions of the agencies are as unreviewable in the courts as those made by the legislature itself.

Second, the Framers contemplated that the electorate would be able to cast their votes on the basis of votes cast by their elected representatives. Yet under agency self-financing mechanisms like that established by Section 7005, legislators never need to cast votes approving or disapproving the actions of administrative agencies or

the way the agencies finance those activities. The electorate is thus deprived of the opportunity to use the electoral process as a referendum on votes cast by their legislators.

Third, the approach embodied in Section 7005 dilutes substantially the budgetary oversight process. Traditionally, administrative agencies have been required to come before congressional committees annually to justify their proposed budgets for the following year. This process has been the means of thoroughly scrutinzing agency activities, priorities, and efficiencies of operation. Under Section 7005, there will be little, if any, such scrutiny. When agency requests for increased funding are accompanied by the assertion that their requests will "not cost the taxpayers a penny," there is little reason for close congressional oversight.

In short, under our constitutional system, federal legislators, not administrators, are responsible for deciding who should pay how much to finance the costs of government. These are " 'quintessential legislative' " choices that "must be made by the elected representatives of the people, not by nonelected officials in the Executive Branch." (citation omitted)[6]

ARGUMENT

Congress and this Court have long shown their fundamental concern for the uniquely legislative character of the power to tax. Central to this concern has been the recognition that "[t]axation and representation are strongly associated in the minds of the people; and they will not agree that any but their immediate representatives shall meddle with their purses." 5 J. Elliot, *Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1787* 416 (3d ed. 1897) (statement of Mr. Gerry).

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[6] *American Textile Manufacturers Institute, Inc. v. Donovan,* 452 U.S. 490, 547 (1981) (Rehnquist, J., dissenting).

The Motion to Affirm and the brief filed on the merits by Appellee Mid-America discuss in detail the historical origins of the constitutional assignment of taxing power to the legislative branch, the significance of the Origination Clause in effectuating that assignment, as well as the difference between the broad delegations of authority to administer and implement programs previously approved by this Court and the delegation of authority to choose a taxing formula under Section 7005. The statute at issue here is different from those considered in the past, not only because of the nature of the choice assigned—how and from whom taxes shall be collected—but also because it involves the taxing power and thus must be scrutinized in light of the Constitution's specific directions for the use of that authority. *Amici*, therefore, focus below on how Congress has exercised its taxing power, and the way that Congress is trying to avoid the responsibilities associated with the use of that power.

I. DELEGATIONS OF TAXING AUTHORITY LIKE THAT CONTAINED IN SECTION 7005 VIOLATE SEPARATION OF POWERS PRINCIPLES BY REQUIRING EXECUTIVE DEPARTMENTS TO MAKE CHOICES ASSIGNED BY THE CONSTITUTION TO THE LEGISLATURE

A. Congress Has the Responsibility to Levy Taxes

Article I of the Constitution places the taxing power on a different footing than most other legislative powers. Not only is the power "To lay and collect Taxes" conferred exclusively on Congress (Art. I, § 8, Cl. 1), but the mechanics of its proper exercise are purposefully set forth in unusual detail: "All Bills for raising Revenue shall originate in the House of Representatives . . ." (Art. I, § 7, Cl. 1). The inclusion of the Origination Clause in Article I was not mere fortuity—its purpose was precisely to keep taxation subject directly and immediately to democratic processes.

The requirement of the Constitution that taxes be levied by Congress reflects the fact that taxing decisions,

by nature, involve complicated political judgments not amenable to the articulation of meaningful standards and line drawing. At the root of these judgments are an array of difficult policy choices. The amount of tax and the persons or entities required to pay the tax must be identified. The degree to which a tax structure should be progressive and have redistributional aims or be fashioned to encourage or discourage certain economic behavior must be determined.

Indeed, it is in part because taxing determinations involve essentially political choices that the judicial branch has afforded Congress and the States great latitude in matters of taxation and has generally refused to review the wisdom, prudence, or ultimate "fairness" of tax legislation. As the Court explained in *McCray v. United States*, 195 U.S. 27, 59 (1904):

> Since . . . the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise.

Judicial reluctance to interfere with congressional tax policy is not, however, an indication that the power is insignificant. On the contrary, this Court long ago recognized that "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). What this judicial deference does reveal, however, is an appreciation for the inherently discretionary nature of taxing decisions and an understanding that the principal constitutional safeguard against abuse of the power to tax lies in close adherence to the separation of powers prescribed by the Constitution: "The only security against the abuse of this power, is found in the structure of the government itself." *Id.* at 428. Here that structure was embodied in the provisions of the Origination Clause. Whatever the fate of the non-

delegation doctrine in other contexts, its application in this case must acknowledge the plain language and plain intent of the Constitution.

To be sure, the Secretary of the Treasury has long been charged by Congress with the responsibility of enforcing and interpreting the tax laws. In the course of those enforcement responsibilities, the Secretary may have occasion either to interpret, or to adopt rules implementing, the Internal Revenue Code (I.R.C.). 26 U.S.C. § 7805 (a) (1988) ("all needful rules and regulations for the enforcement of this title"). The Secretary has been given by Congress considerable latitude in overseeing and developing tax collection policy and procedure. *See* I.R.C. § 6301 *et seq.* (1988).

The scope, however, of the Secretary of the Treasury's application of the Code has been restricted to matters of administration and enforcement.[7] Accordingly, this Court has taken care to emphasize that the Secretary's power to promulgate regulations "for the enforcement of this title" is not the power to legislate or to make the fundamental choices associated with tax legislation. As the Court explained in *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936), the power "to prescribe rules and regulations . . . is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." The Internal Revenue Service's own Statement of Principles echoes the point:

> The function of the Internal Revenue Service is to administer the Internal Revenue Code. Tax policy for raising revenue is determined by Congress. With

[7] The Government relies upon a section of the Windfall Profits Tax Act, 26 U.S.C. § 4997, as evidencing a broad delegation of taxing power. Brief for the Appellant, p. 10, n.5. However, that Act granted the Secretary no authority to specify the types of crude oil that would be subject to the tax or the tax rates.

> this in mind, it is the duty of the Service to carry out that policy by correctly applying the laws enacted by Congress; *to determine the reasonable meaning of various Code provisions in light of the Congressional purpose in enacting them*; and to perform this work in a fair and impartial manner. . . .

Rev. Proc. 64-22, 1964-1 C.B. 689 (emphasis added).

The Service's authority to "interpret" the Code in applying it is a classic example of delegation to an agency "to fill in the details" and apply a congressionally made policy choice to myriad factual contexts. By contrast, and as the Court's statement in *Manhattan General Equipment* suggests, what Congress has never delegated to the Secretary of the Treasury is the basic authority to determine who is to be taxed and to set tax rates. The basic choices must be made by Congress.

Section 7005, by contrast, does not present the Secretary of Transportation with a complete congressional determination that need only be interpreted and applied to specific facts. Section 7005 presents the Secretary with the task of deciding how a specified revenue objective is to be collected and from whom, the essential distributive decisions at the heart of the taxation power.

The Government likens the taxing delegation at issue under Section 7005 with the delegation to the President to set import duties at issue in *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928) and *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976). Those cases are distinguishable. Both involved regulation of foreign commerce as to which the Congress has distinct powers to impose duties under Article I, § 8, Cl. 3.[8] Both involved classically permissible delegations. In *J. W. Hampton*, Congress established base tariff rates but gave the President the power to adjust

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[8] *Board of Trustees of University of Illinois v. United States*, 289 U.S. 48, 58 (1933).

them to equalize the costs of domestic and foreign goods as conditions changed over time. *Algonquin SNG* involved import fees on products found to threaten to impair national security and "articulation of standards to guide the President in making the decision whether to act." 426 U.S. at 559, n.10. *Algonquin SNG*, moreover, did not involve a tax or revenue measure subject to the Origination Clause since the principal purpose of the statute was to protect national security.[9] The delegations made here—how should taxes be assessed and on whom—are much broader, and involve choices that Congress should have made.

B. The Traditional Limits on the Executive Branch's Delegated Authority to Set and Impose Fees

Since at least 1952, Congress has provided general authorization to agencies to impose "fees" to recover costs incurred by the agency in providing services requested by and provided to given firms. In particular, the Independent Offices Appropriations Act, 31 U.S.C. § 9701 (IOAA)—the general federal "user fee" statute—authorizes administrative agencies to recoup the costs of providing special benefits to specific beneficiaries that request agency services. The notion of "fees" rests on the common-sense distinction between agency charges for services rendered by an agency for a firm or person, and agency action that may be characterized as benefiting primarily the public at large (which is properly the subject of taxation). A fee is a *quid pro quo* for services rendered.

In 1970, however, at Congress' specific urging,[10] the Federal Communications Commission (FCC) devised a

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[9] *See Millard v. Roberts*, 202 U.S. 429 (1906); *United States v. Norton*, 91 U.S. 566 (1875) (dictum); *United States v. Stangland*, 242 F.2d 843, 848 (7th Cir. 1957).

[10] *See National Cable Television Ass'n v. United States*, 415 U.S. 336, 339 (1974), *quoting* H.R. Conf. Rep. No. 91-649, p. 6.

schedule of IOAA fees aimed at recovering the agency's entire regulatory budget. Relying on the provisions of the IOAA directing agencies to become "self-sustaining to the full[est] extent possible," *National Cable Television Ass'n v. United States*, 415 U.S. 336, 337 (1974), the FCC acted to implement the congressional plan. At about the same time, the Federal Power Commission (FPC) devised a similar "fee" schedule that would allow it to recover from its jurisdictional utilities all of its costs of administering various federal energy programs.

Citing the constitutional concerns that would arise if Congress had, in fact, sought to avoid its constitutional responsibility for levying taxes by allowing agencies to do so, this Court invalidated both the FCC's and the FPC's proposed fee schedules. *National Cable Television; Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974). Despite the expansive language of the IOAA,[11] this Court found that the proper scope of agency activities was limited to the determination and exaction of "fees"—assessments "incident to a voluntary act" which specifically relate to a benefit "not shared by other members of society." *National Cable Television*, 415 U.S. at 340-41. The Court reasoned that general charges, not specifically correlated to the cost of providing an identifiable benefit, are "taxes." Because Congress "is the

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[11] The Independent Offices Appropriations Act, 1952, Subtitle 5, 65 Stat. 290, 31 U.S.C. § 483a, provided in relevant part:

> It is the sense of the Congress that *any work, service . . . benefit*, . . . license, . . . or similar thing of value or utility performed, furnished, provided, [or] granted . . . by any Federal agency . . . *shall be self-sustaining to the full extent possible*, and the head of each Federal agency is authorized by regulation . . . to prescribe therefor . . . such fee, charge, or price, if any, as he shall determine . . . to be fair and equitable *taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served*, and other pertinent facts . . . .

(emphasis added), later amended by 31 U.S.C. § 9701.

sole organ" with the power to impose taxes, the Court concluded that a narrowing construction of the IOAA was necessary to avoid the constitutional problems raised by bestowing the power to tax on federal agencies. To do otherwise would "carr[y] an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House." *Id.* at 341.

In the decade and a half since *National Cable Television* and *New England Power* were decided, the historical distinction between fees—which agencies may impose under various statutes—and levying taxes—which they may not—has guided the lower federal courts not only in evaluating fee schedules issued pursuant to the IOAA [12] but also in construing other federal statutes in which Congress has conferred upon agencies the authority to recoup expenses for specific services requested and rendered.[13] Implicit in these cases is the recognition

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[12] *See, e.g., Phillips Petroleum Co. v. Federal Energy Regulatory Comm'n,* 786 F.2d 370 (10th Cir.), *cert. denied,* 479 U.S. 823 (1986); *Central & Southern Motor Freight Tariff Ass'n v. United States,* 777 F.2d 722 (D.C. Cir. 1985); *Mississippi Power & Light Co. v. Nuclear Regulatory Comm'n,* 601 F.2d 223 (5th Cir. 1979), *cert. denied,* 444 U.S. 1102 (1980); *National Ass'n of Broadcasters v. Federal Communications Comm'n,* 554 F.2d 1118 (D.C. Cir. 1976); *Capital Cities Communications, Inc. v. FCC,* 554 F.2d 1135 (D.C. Cir. 1976); *New England Power Co. v. Nuclear Regulatory Comm'n,* 683 F.2d 12 (1st Cir. 1982); *Electronic Industries Ass'n v. FCC,* 554 F.2d 1109 (D.C. Cir. 1976); *National Cable Television Ass'n v. FCC,* 554 F.2d 1094 (D.C. Cir. 1976).

[13] *See Sohio Transportation Co. v. United States,* 766 F.2d 499, 502-504 (Fed. Cir. 1985) (applying *National Cable Television* to a revenue-raising delegation in the Mineral Leasing Act); *Nevada Power Co. v. Watt,* 711 F.2d 913, 929-33 (10th Cir. 1983) (applying *National Cable Television* to a revenue-raising delegation in the Federal Land Policy and Management Act); *Alumet v. Andrus,* 607 F.2d 911, 916 (10th Cir. 1979) (same); *City of Vanceburg v. Federal Energy Regulatory Comm'n,* 571 F.2d 630, 644 n.48 (D.C. Cir. 1977) (applying *National Cable Television* to a revenue-raising dele-

that federal agencies are well-suited to assess the costs and value of specific services that they perform and to set fees for those services. However, "expert" administrative bodies are less able than elected representatives to address the political decisions inherent in assessing taxes because administrative bodies are not directly accountable to the electorate. In the context of taxing decisions, a "fair and equitable" standard, or a "reasonable relationship" standard, does little or nothing to constrain the range of policy choices that necessarily go into allocating the taxing burden.

II. CONGRESS HAS ATTEMPTED TO AVOID ITS CONSTITUTIONAL RESPONSIBILITY FOR MAKING TAX DECISIONS IN SECTION 7005 AND OTHER RECENT LEGISLATION

Congress in the COBRA and the Omnibus Budget Reconciliation Act of 1986 (OBRA), departed from the constitutional limitations governing the Executive's capacity to raise revenue. In these acts, Congress directed various federal agencies to finance their own regulatory activities by devising "fair and equitable" annual charges or "fees." The three most prominent provisions—COBRA Section 7005 ("Pipeline safety user fees"), COBRA Section 7601 ("NRC annual charges"), and OBRA Section 3401 ("FERC fees and annual charges")—aptly illustrate this legislative device and the degree to which Congress is finding it increasingly expedient to leave basic taxing decisions to administrative agencies.

A. Congress' Delegation to the Department of Transportation in COBRA Section 7005

Section 7005 of COBRA—at issue in this case—authorizes the Department of Transportation (DOT) to establish a "schedule of fees" by calculating and impos-

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gation in the Federal Water Power Act), *cert. denied,* 439 U.S. 818 (1978); *Alaskan Arctic Gas Pipeline Co. v. United States,* 9 Cl. Ct. 723, 738-39 (1986) (same), *aff'd,* 831 F.2d 1043 (Fed. Cir. 1987).

ing annual assessments on pipelines sufficient to recoup all of the costs associated with DOT's pipeline regulatory programs. The operation of these programs would effectively become self-financing, with the agency administering the program also arranging for its financing. Congress has left it to the Secretary to devise a schedule of assessments "based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines." Section 7005(a)(1). The departure from conventional practice is quite clear.

First, unlike fees as generally understood, Section 7005 assessments are levied against entities that receive no identifiable benefits from the agency. DOT's role vis-a-vis pipelines is a *policing* one—*viz.*, to ensure that DOT safety standards are adhered to through a system of testing and inspections. The purpose of its pipeline safety programs is to offer protective services to the public. The regulations limit the activities of the pipelines; the costs taxed against the pipeline industry include the cost of rulemaking to limit pipeline activities or enforce the law against them. In short, whatever the merit of the underlying safety programs being financed, the purpose of these exactions is plainly to benefit the public generally, not the payers of the "fees," who are arguably its victims—or at least its objects. DOT's pipeline safety program does not confer a special benefit on pipelines "not shared by other members of society." *National Cable Television*, 415 U.S. at 341.[14]

Second, there is no requirement in Section 7005 that charges reflect either the "value to the recipient" or "costs to the government" of services provided. IOAA,

[14] Congress, of course, has the power to tax. The point is that if Congress does elect to tax an industry for the costs of regulating it, it cannot then pass on to the agency the equally discretionary—and fundamentally legislative—decision as to how fairly to allocate that taxing burden among those to be taxed.

31 U.S.C. § 483a. Rather, Section 7005 assessments are designed to recover *all* costs associated with these regulatory programs, including salaries, overhead, administrative costs, collection costs, and an array of other costs unrelated to the provision of any benefit to pipelines. Under these circumstances, these assessments are clearly for the general support of government and not fees incident to a voluntary request for agency service.

Third, and most importantly, in Section 7005, Congress confers upon the agency the discretion to determine tax liability, *i.e.*, to select "some reasonably equitable formula for spelling out each pipeline's portion of those total costs . . ." H.R. Rep. No. 300, 99th Cong., 1st Sess. 497 (1985). Although the statute refers to a "usage" standard, usage is simply one general basis for levying any tax. The Secretary is authorized to make the essential choice of selecting the operative criteria for levying the tax based upon "volume-miles, miles, revenues, or an appropriate combination thereof." Congress itself disavowed its obligation to determine the basis for the tax, leaving the choice of a "reasonably equitable" formula to the Secretary.

B. Congress' Delegation to the NRC in COBRA Section 7601

Section 7601 of COBRA directs the Nuclear Regulatory Commission (NRC), within 90 days after enactment, to develop a system to assess and collect annual fees from the NRC's licensees which would "fund all or part of the activities conducted by the Commission," and to provide Congress with a report. Under Section 7601 (b)(1), the NRC was required, within 45 days of its report, to impose annual charges on "its licensees" through rulemaking. Congress imposed only three limitations on the NRC in carrying out its revenue-raising task: (1) the aggregate annual fees plus other amounts

collected (*e.g.*, under the IOAA) may not exceed 33 percent of the NRC's fiscal year costs,[15] (2) the annual charges must be "reasonably related to the regulatory service provided by the Commission," and (3) the charges "shall fairly reflect the cost to the Commission of providing such service." [16]

This "fee" provision illustrates the basic departure from the concept of "fees" as defined in *National Cable Television.*[17] First, NRC "fees" are not imposed in di-

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[15] The amount was increased to 45 percent in 1987. Omnibus Budget Reconciliation Act of 1987, P.L. 100-203, 101 Stat. 1330, § 5601, 42 U.S.C. § 2213(b) (1988).

[16] The NRC issued its rule adopting annual fees under COBRA Section 7601(b) on September 18, 1986. 51 Fed. Reg. 33,224. To calculate the annual charges, the NRC used a "cost basis" comprised of the cost of all the NRC programs and activities for which the NRC sought recovery through the annual charges. 51 Fed. Reg. 24,078-24,082 (July 1, 1986); 51 Fed. Reg. 33,224-33,231 (Sept. 18, 1986). In large measure, these costs relate to programs and activities that serve broad public purposes, such as public health and safety objectives, and are essentially the cost of regulation, or of activities supporting regulation.

For example, out of $124 million in the total cost basis, most, $74 million, is for research activities to promote a rise in the general level of knowledge. 51 Fed. Reg. 33,226.

[17] The point was well expressed by the authors of a recent report to the Administrative Conference of the United States:

> Insofar as authorizations such as that conferred on the NRC require no linkage to particular benefits, there is no reason to believe that fees will induce an appropriate level of regulation or request for government services. To the contrary, any relationship between fees imposed and appropriate levels of services provided may be wholly coincidental. The user fee in this situation has become largely a revenue raising device imposed on particular recipients of governmental service. Such a revenue raising device, although denominated a charge or user fee, is indistinguishable from a redistributional tax.

Gillette & Hopkins, *A Report to the Administrative Conference of the United States on Federal User Fees* (May 1987).

rect exchange for requested service. Congress has altogether eliminated the *quid pro quo* requirement that is the *sine qua non* of a traditional fee. What triggers the imposition of a Section 7601 annual fee is not any specific request for service or agency action, but merely the fact of being subject to the Commission's jurisdiction. As a result, there is no necessary correlation between the value of agency services a licensee may receive and its fees. *See New England Power*, 415 U.S. at 351 (striking down FPC fees because, *inter alia*, "[s]ome of the assessments made by the Commission under its formula would be on companies which had no proceedings before the Commission during the year in question"). Moreover, under the rule, all licensees subject to the fee are charged the same amount per reactor despite substantial differences, such as the age, size, type, and output of their reactors.

Second, Section 7601 illustrates the range of discretion Congress is willing to give to an agency in determining the objects of taxation. Under Section 7601, the NRC was given the discretion to, and has in fact elected to, impose fees only against certain entities within its regulatory jurisdiction and not others. Thus, the NRC has elected to impose annual charges on those who possess a license to operate a nuclear power reactor, but has excluded entirely from the annual charges major nuclear material licensees (including large uranium processing operations), nuclear power related vendors, small materials licensees, and research reactor licensees. The NRC itself advised Congress that Section 7601 provides a "very broad legislative delegation of fee-setting authority without any controlling standards.." [18]

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[18] Letter from Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, to Senator Alan K. Simpson, Chairman, Subcommittee on Nuclear Regulation, Committee on Environment and Public Works, United States Senate, October 1, 1985.

C. Congress' Delegation to the FERC in OBRA Section 3401

The Omnibus Budget Reconciliation Act of 1986 (OBRA), P. L. 99-509, § 3401, 100 Stat. 1890, following one year after Sections 7005 and 7601 of COBRA, makes the Federal Energy Regulatory Commission (FERC) an entirely self-financing federal regulatory agency. Section 3401, like Sections 7005 and 7601, brings the constitutional difficulties associated with this legislative development into sharp focus: Congress has given the agency virtually complete discretion to (1) select the objects of taxation and (2) devise its own taxing agenda subject only to the requirement that the exactions by which it finances its regulatory activities be "fair and equitable."

Specifically, Section 3401 gives FERC the power to "assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year." Section 3401(a). The only standard Congress sets forth in the statute to guide FERC's formulation is the instruction that the charges be "fair and equitable." Section 3401(b). Similarly, Section 3401 commits to FERC's discretion decisions concerning which entities or classes of entities from among those regulated by the agency are to be taxed. As the legislative history explains, Congress elected to allow FERC to "specify the specific classes of entities subject to annual charges or fees. . . ." House Conference Report No. 99-1012 at 239.[19] Thus, decisions regarding the

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[19] To implement Section 3401, on January 28, 1987, the FERC issued a Notice of Proposed Rulemaking (NOPR), in which it proposed to recover, through annual charges, all costs not recouped through existing IOAA filings and FPA assessments. To create the required procedure, the FERC determined:

(1) who would be billed;

(2) the allocation of its costs among its regulatory programs;

[Continued]

basis on which these charges should be calculated, and how FERC's budgetary costs should be fairly apportioned among those entities to be taxed, are left entirely to FERC's discretion.

The costs which Section 3401 directs FERC to recoup encompass the entire range of costs incurred by the agency in performing its regulatory functions. Indeed, since FERC already recovers through IOAA such fees as it believes are its direct costs for services rendered, the primary aim of Section 3401 charges is to finance the agency's indirect costs, that is, the cost of salaries, pensions, rent, and administrative overhead such as telephone and computer support.[20]

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[19] [Continued]

(3) the allocation of each regulatory program's direct and indirect costs among companies regulated under each program; and

(4) the standards for waiving all or part of an annual charge.

FERC proposed to assess annual charges against only three types of companies: public utilities, interstate natural gas pipelines, and interstate oil pipelines. Other FERC-regulated entities would be exempt, including: intrastate natural gas pipelines, natural gas producers, certain liquefied natural gas importers, certain smaller natural gas pipelines, appellants from Department of Energy proceedings, power marketing agencies, electric co-generators and small electric power producers. 52 Fed. Reg. 3132, 3135-37. Payments due from non-exempt entities would be increased to cover the revenues lost through such exemptions. *Id.* at 3132, 3134-35 & 3137.

The final rule promulgated by the FERC and made effective on May 29, 1987, adopted most elements of the NOPR respecting the types of entities to be billed under Section 3401, the estimation and allocation of program costs, adjustments for under or over recovery of fees and the standards for waiving all or part of the annual charges. 52 Fed. Reg. 21,263-21,265 (June 5, 1987) (to be codified at 18 C.F.R. § 154.38, 375.306-08, 382.101-06, 382.201-03).

[20] Such "indirect" administrative costs made up about eighty-seven percent of FERC's 1988 budget, according to FERC Chairperson Martha O. Hesse. *See* Budget Oversight Hearing Before the Senate Committee on Energy and Natural Resources, 100th Cong.,

FERC is a federal agency whose purpose, policies, and programs are designed to promote the public good.[21] Thus, whatever incidental benefits might be received by companies regulated by the FERC, the public is the intended beneficiary of most of the FERC's activities.

Experience under the FERC "annual charge" statute demonstrates how an agency can assuage congressional fears about increased spending levels, enforcement priorities, and even administrative efficiency and waste, simply by reiterating the point that the agency needs no tax dollars because it is covering its costs of operation by imposing "fees" on those it regulates. When FERC Chairman Martha O. Hesse went before the House of Representatives Appropriations Committee in March of 1988, the first point she made in addressing possible concern about FERC's $7 million increased spending request was that FERC is now, by virtue of OBRA Section 3401, a self-sustaining agency:

1st Sess. (1987) (Statement of Martha O. Hesse, Chairperson of the Federal Energy Regulatory Commission). With the ability to recover all of its budget through annual charges, FERC clearly has less incentive to track cost incurrence and to collect in direct fees the costs actually attributable to a particular regulatee. This results in those who use more FERC services being subsidized by those who use FERC less, or not at all.

[21] The range of activities that FERC undertakes and is responsible for in promoting the public interest provides a clear indication of how far Congress has gone to seek revenue from a few to provide government services for all. In adopting the Federal Power Act, 16 U.S.C. §§ 791 *et seq.* and the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*, the Congress sought to protect the consumer interest through provisions to assure adequate and reliable supplies of energy at the lowest reasonable cost. This Court has often noted that a primary purpose of both the Federal Power Act and the Natural Gas Act is to "protect . . . consumers" from excessive charges, *e.g.*, *Pennsylvania Water & Power Co. v. Federal Power Comm'n*, 343 U.S. 414, 418 (1952); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

> Beginning this fiscal year, the commission is recovering its entire budget through annual charges and fees paid by the industries that we regulate. As a result, I'm pleased to report that the commission is now . . . a totally self-supporting agency.
>
> Within this framework, our proposed 1989 budget, while at most $7 million more than that approved by Congress for the current fiscal year, will not cost the U.S. Treasury or the American taxpayer any additional funds.

Hearings Before a Subcomm. of the Comm. on Appropriations, 100th Cong., 2nd Sess. 1 (1988).[22]

When agencies have the capacity to finance themselves, and can appease the concerns of the Appropriations Committees by insisting that budget growth will require "no new taxes", the net result is a marked loss of Congressional policy oversight and spending discipline. Executive branch respect for the power of the purse must not be lost because Congress desires to escape accountability

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[22] The following colloquy ensued:

Mr. BEVILL. Did I understand you to say $7 million above the amount that you received in appropriations.

Ms. HESSE. For the current fiscal year.

Mr. BEVILL. Yes.

Ms. HESSE. Yes.

Mr. BEVILL. So you got shortchanged about $7 million.

Ms. HESSE. I don't feel that we were shortchanged. We have enough money.

Mr. BEVILL. Well, you're the only one. We are volunteering you to help contribute to the reduction of the deficit.

Ms. HESSE. I'm pleased to do my part. I don't know how many—[Laughter.]

Ms. HESSE. [continuing]. How many other independent regulatory agencies are self-supporting, but we are.

Mr. BEVILL. I do think that's commendable. We don't have many agencies come before us that are self-sustaining.

Ms. HESSE. Yes, FY 1988 was the first year.

Mr. BEVILL. Well, I think that's commendable. I hope that catches on with all these other agencies.

for the fundamental taxing and spending decisions entrusted to it by the Constitution.

D. The Consequences of Section 7005 and Other Recent Legislation

Section 7005 changes the process by which interested parties may affect taxing decisions by channeling those decisions through an administrative, rather than legislative, process. Precisely because of the intrinsically political nature of taxing decisions—because they often involve equitable choices, rather than expertise—they have historically been well-handled by the political process. The Framers assuredly intended electoral accountability for taxing decisions to be the primary constraint on the feared propensity of the Government to increase taxes.[23]

Even on its own terms, however, the administrative alternative is less than satisfactory as a substitute for political decisionmaking. One element of administrative decisionmaking that is deemed part of the fair exchange for the right to have a matter determined legislatively, is the right of judicial review to supplement the review by the administrative agency itself. In matters of taxation, however, it is well understood that the political nature of the relevant determination renders the ultimate decision virtually unreviewable in a court of law. Moreover, as Professor Tribe has noted, "[t]he same discretionary character of taxation that ordinarily shields it from effective judicial review would also make legislative oversight of a delegate difficult." L. Tribe, *American Constitutional Law* § 5-17, n. 15 (1988).

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[23] By calling taxes something else, and by asking unelected officials within diverse federal agencies to decide how and upon whom these exactions are to be imposed, legislators can effectively take credit for doing something to reduce the deficit without at the same time being accountable for directly increasing anyone's tax liability.

Beyond the fact that unelected administrative officials are a constitutionally inadequate substitute for congressmen, the electorate is deprived of its right to use popular election—particularly the biennual election of representatives in the House—as a referendum on the legislator's vote on a given taxing issue or issues. Those in Congress who might otherwise be counted as supporters of higher taxes can rightly point out that the burden and timing of new taxes is the result of regulatory action. While not every taxing decision may be unpopular or corrosive of public support, the incentive to disguise taxes in this way is politically irresistable. The Framers may not have foreseen such a ploy, but its use is no doubt inconsistent with the spirit and letter of Article I of the Constitution.

A less obvious, but equally serious, danger in "taxation by delegation" is the way in which it may loosen congressional oversight and control over agency spending. That the taxing and spending powers are grouped together in Article I is no accident. Congress's ability (and willingness) to control spending and oversight effectively hinges on the fact that increased governmental expenditure ultimately requires Congress to answer to its constituents for more tax revenues.

CONCLUSION

Congress has gone too far in seeking to avoid difficult taxing decisions by granting to federal agencies the power to finance the direct and indirect costs of particular programs (as under Sections 7005 and 7601) or of all the agency's activities (as under Section 3401). The Environmental Protection Agency and the Consumer Product Safety Commission may be in line to receive similar authority.[24] To paraphrase the Court's *Chadha* reasoning, this Court's "inquiry is sharpened rather than blunted by the fact that [these] provisions are appearing

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[24] 134 Cong. Rec. H7811-H7827 (September 20, 1988).

with increasing frequency in statutes which delegate authority to executive and independent agencies." *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 944 (1983). As set out above, this device of delegation of the taxing power, and administrative levys now being pursued by Congress has significant consequences for the electorate's control both over taxing decisions and over the activities of administrative agencies. The change reflected in Section 7005 is inconsistent with the text of the Constitution and its premises. Thus, the District Court's judgment should be affirmed.

Respectfully submitted,

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